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No. 02-384

In the Supreme Court of the United States

ALLEN BLACKTHORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that admission at trial of the deceased victim's 1987 deposition testimony was harmless.

2. Whether the district court erred in admitting as evidence of petitioner's motive to murder his ex-wife that she had made repeated child sexual abuse allegations against petitioner that angered him.

3. Whether the court of appeals committed reversible error in concluding that incorrect testimony by a witness that he had seen the victim outside her home two months before her murder was not "material," where any falsity in the testimony was revealed to the jury during cross-examination.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-39) is unpublished, but the judgment is noted at 37 Fed. Appx. 88 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2002. The petition for rehearing was denied on June 10, 2002 (Pet. App. 40-41). The petition for a writ of certiorari was filed on September 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was

convicted of one count of conspiring to use interstate commerce facilities in the commission of murder for hire, in violation of 18 U.S.C. 1958(a), and one count of causing another to cross state lines to commit domestic violence, in violation of 18 U.S.C. 2, 2261(a)(1) and (b)(1). He was sentenced to concurrent life sentences. Pet. App. 9. The court of appeals affirmed. *Id.* at 1-39.

1. Petitioner arranged for the murder of his former wife, Sheila Bellush. In 1987, the couple divorced and over the next decade, petitioner and Bellush engaged in an acrimonious dispute over the custody of their children (which eventually was awarded to Bellush) and petitioner's child-support obligations. During the litigation, petitioner claimed that Bellush physically and psychologically abused their daughters, and Bellush accused petitioner of sexually abusing one of them. Petitioner repeatedly made threats against Bellush, including threats on her life. Pet. App. 2-3. In one instance, during a discussion about the murder of one of Bellush's friends (whom Bellush believed had been killed by the friend's husband), petitioner warned Bellush not to anger him or "the same thing will happen to you." 6/21/00 Tr. 239. In a separate episode, petitioner told one of their children that he hated Bellush and "wanted her dead." 6/12/00 Tr. 110. Petitioner also told a coworker that "he had the contacts to have [Bellush] taken to Mexico and she wouldn't return." 6/15/00 Tr. 148.

Tensions increased after Bellush remarried in 1997 and petitioner sought to enforce his visitation rights. Petitioner claimed that Bellush and her husband were physically abusing one of the daughters, and Bellush, in turn, again accused petitioner of sexual abuse. Pet. App. 3; Gov't C.A. Br. 9. After the judge overseeing the case informed the parties he was considering order-

ing both families into counseling, petitioner unexpectedly relinquished his parental rights. Petitioner complained to his secretary that each time they went to court, Bellush made the same false child-abuse accusations. Pet. App. 3; Gov't C.A. Br. 9-10.

During a trip to Oregon shortly afterwards, petitioner asked Danny Rocha, a golf companion and bookie, whether he knew anyone who would kill Bellush. Rocha said that he did not, but that he could probably arrange to have her beaten. Pet. App. 4; Gov't C.A. Br. 10-11. Petitioner decided to pursue the option, telling Rocha that he wanted Bellush "crippled in a wheelchair with no tongue." 6/13/00 Tr. 54, 218. In September 1997, petitioner agreed to pay $4000 to procure the assault, and he gave the money to Rocha, along with a photo of Bellush and her home address in Boerne, Texas. Rocha then convinced a friend, Sam Gonzales, to hire someone to commit the assault, and gave him the money, photo, and address. Pet. App. 4-5; Gov't C.A. Br. 11.

Gonzales enlisted his cousin, Joey Del Toro, to assault Bellush for $3000. Gonzales and Del Toro then began trying to locate Bellush at her home in Boerne, Texas. On September 13, 1997, Gonzales saw a women he believed to be Bellush in the backyard of her home as he and Del Toro drove past, but she left before Del Toro could get out of the car to attack her. Pet. App. 5; Gov't C.A. Br. 12-13. Unbeknownst to them, Bellush was then in Florida seeking to relocate her family to that state to get away from petitioner. Because Gonzales and Del Toro were unsuccessful in locating Bellush, they contacted Rocha (who in turn contacted petitioner) seeking help. Petitioner eventually obtained Bellush's new address in Sarasota, Florida, through a private investigator. Pet. App. 6; Gov't C.A. Br. 14-15.

Bellush temporarily lost custody of one of her daughters in September 1997 after striking her during a dispute over a visit she had made to petitioner without permission. After Bellush regained custody of the girl, petitioner offered Rocha $50,000 if petitioner obtained custody of his children, instructing Rocha that "the guys" should "use their imagination." 6/13/00 Tr. 116-118. Petitioner said that he did not care if Bellush died, and he instructed that the best way for them to receive the money was "if no one finds the body," suggesting they "dump her in the ocean or bury her in the woods." *Id.* at 119. Rocha, who was planning to keep $40,000 for himself, told Gonzales that petitioner was offering a $10,000 "incentive" if he obtained custody of his daughters. Pet. App. 6.

On November 4, 1997, Rocha and Del Toro met. Rocha told Del Toro he would be paid $4000 to assault Bellush, and that petitioner would pay a $10,000 "incentive" if petitioner obtained custody of his daughters. Rocha told Del Toro that the easiest way to get the $10,000 was "just to shoot her." Pet. App. 7; Gov't C. A. Br. 17; 6/20/00 Tr. 137. Rocha gave Del Toro Bellush's address and $500, and agreed to pay the remaining $3500 when he returned. Rocha also passed along petitioner's suggestions on where to park his car and when to attack to maximize his chances of success. Pet. App. 7; Gov't C.A. Br. 17.

On November 7, 1997, Del Toro murdered Bellush in her home by shooting her in the head with a .45-caliber pistol, beating her, and slashing her throat with a knife. Pet. App. 8; Gov't C.A. Br. 4-5. When Gonzales informed Rocha, he provided Gonzales the remaining $3500 to give to Del Toro. Pet. App. 8; Gov't C.A. Br. 18. Later that night, Rocha met with petitioner. After learning that Bellush had been killed in her home, peti-

tioner complained that Del Toro had "messed up" by not following his instructions to dispose of the body so it would not be found. 6/13/00 Tr. 145. On November 10, 1997, petitioner met Rocha and gave him the $10,000 "incentive" payment. Petitioner told Rocha not to talk to authorities, and said that he would provide lawyers for the co-conspirators if investigators became suspicious of them. Petitioner never again contacted his daughters or provided financial support for them. Pet. App. 8; Gov't C.A. Br. 19.

2. A federal grand jury charged petitioner with one count of conspiring to use interstate commerce facilities in the commission of murder for hire, in violation of 18 U.S.C. 1958(a), and one count of causing another to cross state lines to commit domestic violence, in violation of 18 U.S.C. 2, 2261(a)(1) and (b)(1). After a jury trial, petitioner was convicted on both counts. He was sentenced to concurrent terms of life imprisonment on each count. Pet. App. 9; Gov't C.A. Br. 3-4.

3. The court of appeals affirmed. Pet. App. 1-39.

a. The court held that the district court did not err in admitting evidence of Bellush's allegations that petitioner had sexually abused one of their daughters. The court noted that "[t]hese allegations angered [petitioner] and, therefore, are highly relevant as to why he would want Mrs. Bellush dead." Pet. App. 21. The court also concluded that the probative value of the evidence "substantially outweigh[ed] any prejudicial effect" (*ibid.*), noting that limiting instructions eliminated the possibility of undue prejudice. *Ibid.* The court also rejected petitioner's argument that the government was required to prove the truth of the allegations under Federal Rule of Evidence 404(b). The court held that Rule 404(b) was inapplicable because the evidence was not offered to show that petitioner had en-

gaged in prior bad acts, but only to show that Bellush's actions had given petitioner a motive to have her killed. Accordingly, the veracity of the allegations was "irrelevant." Pet. App. 22.

b. The court of appeals next considered petitioner's claim that the district court erred in admitting under Federal Rule of Evidence 804(b)(1) portions of Bellush's 1987 deposition, taken during the couple's divorce proceedings, in which she stated that petitioner had threatened to kill or maim her. The court held that the district court had erred in admitting the evidence because, in contrast to the situation in connection with his criminal charges, petitioner had not had a similar incentive to discredit the testimony at the time of the deposition. Pet. App. 26-29. Noting that Bellush's deposition testimony was "cumulative" in light of other substantial evidence that petitioner had threatened to kill Bellush and that the evidence of petitioner's guilt was "exceptionally strong" (*id.* at 29-30), the court of appeals held that the error was harmless because admission of "the deposition testimony did *not* affect the outcome of the proceedings." *Id.* at 29.

c. The court rejected petitioner's claim that, by eliciting testimony from Gonzales that he had seen Bellush in the backyard of her Boerne, Texas, house on September 13, 1997 (although it knew she had been in Florida until the following day), the government had violated his due process rights by knowingly eliciting material perjured testimony. See *Napue* v. *Illinois*, 360 U.S. 264 (1959). The court stated that false testimony is material in the context of *Napue* violations if, in light of its introduction, there is a "reasonable probability of a different outcome." *United States* v. *Blackthorne*, No. 00-

51256 (5th Cir. May 3, 2002), slip op. 34.[1] Noting that on cross-examination, Gonzales clarified that he merely "*thought* the woman he saw was Mrs. Bellush, based on pictures [petitioner] had provided Rocha," *id.* at 31, the court held that the testimony in question was immaterial because "[a]ny false information Gonzales may have conveyed to the jury was corrected," thus giving the jury sufficient information to adequately perform its fact-finding function.[2] *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 11-15) that the court of appeals erred by failing to evaluate the admission of Bellush's deposition testimony for constitutional error and for harmlessness under the standard of *Chapman* v. *California*, 386 U.S. 18 (1967). He claims that the court of appeals erred by evaluating his claim under the harmless-error standards for nonconstitutional claims instead of the "more demanding *Chapman* standard." Pet. 13 (quoting *United States* v. *York*, 852 F.2d 221, 226-227 (7th Cir. 1988)).

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[1] Because of a typographical error, the Petition Appendix mistakenly indicates that the court stated that evidence is material if its introduction creates an "*un*reasonable probability of a different outcome." Pet. App. 30 (emphasis added).

[2] The court of appeals also rejected petitioner's claims that (1) the evidence was insufficient to support his convictions (Pet. App. 9-14); (2) the videotape of a television interview of Rocha should have been admitted into evidence (*id.* at 14-17); (3) the district court should not have ruled pre-trial on the admissibility of allegations he threatened Bellush and abused their child (*id.* at 23-24); (4) the jury instructions were erroneous (*id.* at 32-36); (5) the district court erred in responding to a question from the jury during deliberations (*id.* at 36-38); and (6) the district court erred in denying petitioner's new trial motion (*id.* at 38-39). Petitioner does not renew those claims before this Court.

Although petitioner argued before the district court that admission of the Bellush deposition testimony was inconsistent both with Federal Rule of Evidence 804(b)(1) and the Confrontation Clause of the Sixth Amendment (see 6/15/00 Tr. 8-9; Pet. C.A. Br. 53), petitioner raised no Confrontation Clause challenge before the court of appeals. Petitioner argued only that "[t]he admission of the civil discovery deposition was erroneous under Rule 804(b)(1)." Pet. C.A. Br. 54; *id.* at 55 ("the former testimony did not meet the admissibility requirements of 804(b)(1)"); *id.* at 15 (in summary of argument, stating only that the deposition testimony "was not properly admissible under Rule 804(b)(1)"); Pet. C.A. Reply Br. 25-27. This Court generally does not address claims that were neither raised in nor decided by the court of appeals, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993), and review should be denied for that reason alone.

Even if this claim were properly preserved, petitioner points to no conflict among the circuits on the proper standards to be applied when assessing a properly presented Confrontation Clause claim,[3] and his factbound claim does not warrant plenary review. Even assuming that admission of the deposition testimony violated the Confrontation Clause, the record clearly indicates that the error was harmless beyond a reasonable doubt. As the court of appeals noted, "the

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[3] The court of appeals clearly has indicated that the *Chapman* harmless-error standard applies to properly presented Confrontation Clause claims. See, *e.g.*, *United States* v. *Bentley*, 875 F.2d 1114, 1117 (5th Cir. 1989). It has also explicitly acknowledged that the *Chapman* standard is more rigorous than the standard of harmlessness for mere evidentiary errors. See *United States* v. *Sarmiento-Perez*, 633 F.2d 1092, 1104 (5th Cir. 1981), cert. denied, 459 U.S. 834 (1982).

evidence against petitioner * * * was exceptionally strong" (Pet. App. 29), and the deposition testimony was merely cumulative of other evidence that "firmly substantiated" the numerous threats petitioner made to kill Bellush or have her killed. *Ibid.*

2. Petitioner next contends (Pet. 15-23) that the district court erred in admitting evidence that Bellush made sexual abuse allegations against petitioner during the course of the custody proceedings. He contends that such evidence was inadmissible under Federal Rule of Evidence 404(b) because the government failed to prove that he actually committed the abuse. Petitioner further contends that the evidence was inadmissible to prove intent because his intent was not at issue at trial, in light of his defense that he did not do the charged acts at all. Petitioner's contentions merit no further review.

a. Petitioner contends that the evidence of the allegations was inadmissible under Rule 404(b). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident * * * .

Fed. R. Evid. 404(b). Citing this Court's decision in *Huddleston* v. *United States*, 485 U.S. 681, 689 (1988) ("In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor."), petitioner argues that the abuse allegations were

irrelevant because the government never proved them to be true. Pet. 20-21.

As both lower courts correctly reasoned, the flaw in petitioner's argument is that the admissibility of evidence that Bellush had made sexual-abuse allegations is not governed by Rule 404(b), because it was not offered as evidence of prior acts by *petitioner*. Pet. App. 21-22. Rather, evidence of *the victim's* acts (*id.* at 36)—i.e., her making of the allegations—was introduced to show the hostility between Bellush and petitioner and to prove that her repeated abuse allegations in the divorce and custody litigation, culminating in petitioner's loss of access to his daughters, fueled his hatred of her and provided a motive for having her murdered. As the court of appeals correctly concluded, the veracity of the allegations was "irrelevant" to the question of petitioner's motive, and therefore the government "was not required to prove their truth." *Id.* at 22. To avoid unfair prejudice, the jury repeatedly was instructed not to consider the allegations as true. *Id.* at 25-26 (judge instructed jury that abuse allegations "must not be considered by you as true. I want to reemphasize that instruction. * * * [Y]ou should not think or even suspect that [petitioner] sexually abused [his daughter]"). *Ibid.*[4] The mere fact that the district court adapted

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[4] Petitioner also contends (Pet. 17, 21) that "[t]he panel failed to even address the district court's inaccurate instruction" on the abuse allegations. By merely referencing his appellate brief without elaboration, petitioner has failed to properly present a challenge to the jury instructions in this Court. Cf. Sup. Ct. R. 14.2 (providing that "[a]ll contentions in support of a petition for a writ of certiorari shall be set out in the body of the petition"); *McCarver* v. *Lee*, 221 F.3d 583, 588 n.1 (4th Cir. 2000) (appellant "cannot preserve arguments" raised in lower court "merely by incorporating them by reference in a few sentences in his brief"), cert.

language from a pattern instruction involving Rule 404(b) to frame its limiting instruction (Pet. 16, 17 n.13) does not alter that conclusion.

b. Petitioner further contends that evidence of the sexual-abuse allegations was inadmissible to prove his intent because he purportedly did not put his intent at issue. He claims that the courts of appeals are in conflict on "whether evidence of the defendant's prior bad acts may be admissible under Rule 404(b) to prove intent where there is direct evidence of intent and the defendant makes no issue of his intent or stipulates that his intent is not at issue." Pet. 23. This case presents no circuit conflict and merits no further review by this Court.

To begin with, the purported conflict petitioner cites—which concerns whether other-acts evidence is admissible to prove intent when the defendant denies "that 'he did * * * the charged act at all'" (Pet. 17 (quoting *United States* v. *Jemal*, 26 F.3d 1267, 1273 (3d Cir. 1994))—is not implicated in this case. As petitioner notes (Pet. 17), some courts have held that when the defendant claims that he had no involvement in a crime, "intent is not placed in issue" and thus "evidence of other acts is not admissible for the purpose of proving intent." *United States* v. *Ortiz*, 857 F.2d 900, 904 (2d Cir. 1988), cert. denied, 489 U.S. 1070 (1989); accord,

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denied, 531 U.S. 1089 (2001); *Pitsonbarger* v. *Gramley*, 141 F.3d 728, 740 (7th Cir.) (same), cert. denied, 525 U.S. 984 (1998). In any event, the court of appeals fully considered petitioner's challenges to the district court's limiting instructions on the abuse allegations, and concluded that the instructions were "more than adequate," as "[t]he jury was repeatedly admonished that the truth of the allegations was not at issue, and that it was only to consider, for limited purposes, the fact that the allegations were made." Pet. App. 35.

e.g., *Jemal*, 26 F.3d at 1273; *United States* v. *Jenkins*, 7 F.3d 803, 807 (8th Cir. 1993). Here, however, the district court permitted the government to introduce evidence of Bellush's sexual-abuse allegations (and the court of appeals upheld its introduction) on the ground it was relevant to *motive*, not intent. Pet. App. 21 (district court concluded evidence of allegations was probative of motive; court of appeals concluded allegations were "highly relevant as to why he would want Mrs. Bellush dead"); Pet. 24 ("the allegations were essential to prove motive"); Pet. 17 (noting that the court of appeals "only addressed motive"). Whatever the relevance of evidence concerning intent when the defendant denies involvement in the crime, cf., *e.g.*, *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991) ("[a] simple plea of not guilty. . . puts the prosecution to its proof as to all elements of the crime charged") (quoting *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988)), evidence demonstrating the defendant's motive to commit the crime is highly relevant when he denies any involvement in it. Cf. *United States* v. *Tokars*, 95 F.3d 1520, 1535 (11th Cir. 1996) (evidence of wife's wish to divorce husband was "extremely relevant to [defendant's] motive to kill"), cert. denied, 520 U.S. 1132 and 1151 (1997). See generally *Black's Law Dictionary* 727 (5th ed. 1979) ("Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.").[5]

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[5] Even if the evidence had been admitted because of relevance to intent, petitioner errs in suggesting that his intent was not at issue. Far from offering to stipulate to the requisite intent, petitioner actively contested the intent element of the charged conduct. While one defense theory advanced by petitioner was that he was not involved in the charged conduct at all and that the

Moreover, as petitioner himself suggests, Pet. 18, any circuit conflict appears to have been resolved by this Court's decision in *Old Chief* v. *United States*, 519 U.S. 172 (1997), in which this Court emphasized "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away" (*id.* at 189) and thereby restrict the prosecution's traditional leeway to introduce evidence to prove each of the elements of the crime. Petitioner cites no decisions post-dating *Old Chief* to suggest that any circuit conflict persists. As the Eighth Circuit concluded, "*Old Chief* has overruled, or at least substantially limited, th[is] * * * line of cases." *United States* v. *Hill*, 249 F.3d 707, 712 (8th Cir. 2001). Accordingly, any need to address the issue has been eliminated.

3. Finally, petitioner contends (Pet. 23-29) that the court of appeals applied an incorrect standard of "materiality" in rejecting his claim that the prosecutor knowingly and intentionally elicited perjured material testimony when Gonzales testified that on September 13, 1997, he believed he saw Bellush in the backyard of her residence in Boerne, Texas. Pet. App. 31. Petitioner contends that in stating that perjured testimony

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testimony provided by Gonzales and Rocha was not credible, he also attempted to defend himself on the charge of conspiring in a murder-for-hire on the basis that he intended only to have Bellush beaten, not to have her killed. See Pet. App. 12. Accordingly, the record does not support petitioner's assertion that intent was not at issue in this case, even under the position taken in some opinions that a stipulation on intent may preclude the introduction of proof on the issue. See *Jemal*, 26 F.3d at 1274 (before the government will be precluded from introducing other acts evidence, "defendant's proffer [to stipulate] must be comprehensive and unreserved, completely eliminating the government's need to prove the point it would otherwise try to establish using 404(b) evidence").

is material if its introduction creates a "reasonable probability of a different outcome" (*Blackthorne*, No. 00-51256, slip op. 34 (quoting *United States* v. *O'Keefe*, 128 F.3d 885, 893 (5th Cir. 1997), cert. denied, 523 U.S. 1078 (1998)); Pet. App. 30, the court of appeals applied a standard that is less exacting than that required by this Court's decision in *Napue* v. *Illinois*, 360 U.S. 264 (1959). That narrow claim of error merits no further review.

The "reasonable probability" standard for determining the materiality of false testimony employed by the court of appeals in its unpublished decision in this case (and in its earlier decision in *O'Keefe* on which it relied) is the same formulation adopted by this Court for determining the materiality of undisclosed exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny. See *O'Keefe*, 128 F.3d at 893 (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995)). Although that formulation differs slightly from the formulation that this Court has articulated for assessing materiality in the context of perjured testimony (*i.e.*, whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury," *United States* v. *Agurs*, 427 U.S. 97, 103 (1976)),[6] petitioner has made no showing that he would be entitled to relief under that formulation. In fact, "the differences [between] the standards are slight." *Strickler* v. *Greene*, 527 U.S. 263, 300 (1999) (Souter, J., concurring in part and dissenting in part); see *United States* v. *Gonzalez-Gonzalez*, 258 F.3d 16, 22 (1st Cir. 2001) (calling them

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[6] Petitioner's reliance (Pet. 24) on *United States* v. *Bagley*, 473 U.S. 667, 678-679 (1985), is misplaced, as the portion of *Bagley* he cites was joined by only two members of the Court. *Ibid.* (opinion of Blackmun, J., joined by O'Connor, J.).

"equivalent").[7] Furthermore, because petitioner did not raise any claim of perjured testimony before the district court (Pet. App. 30), the challenge properly was reviewable on appeal only under the plain-error standard. See *United States* v. *Geston*, 299 F.3d 1130, 1134 (9th Cir. 2002) (claim of knowing use of perjured testimony not raised at trial reviewed only for plain error); accord *United States* v. *Vallie*, 284 F.3d 917, 921 (8th Cir. 2002); *United States* v. *Caballero*, 277 F.3d 1235, 1243 (10th Cir. 2002); *United States* v. *Green*, 258 F.3d 683, 692-693 (7th Cir. 2001). See generally Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (in order for an appellate court to correct an error that was not raised in the trial court, there must be (1) an error, (2) that is "plain," (3) that "affect[s] substantial rights," and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings"). As the court of appeals correctly recognized, the standard it employed was "more lenient" to petitioner (Pet. App. 31) than the plain error standard that actually governs the claim.

In any event, the court of appeals correctly concluded that the evidence was not material, and that factbound

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[7] In a number of published decisions post-dating *O'Keefe*, the court of appeals has applied *Napue*'s "reasonable likelihood" standard to claims involving the use of false testimony. See *Knox* v. *Johnson*, 224 F.3d 470, 478, 481 (5th Cir. 2000) (distinguishing standard from "reasonable probability" employed for *Brady* violations), cert. denied, 532 U.S. 975 (2001); *Barrientes* v. *Johnson*, 221 F.3d 741, 756 (5th Cir. 2000) ("In adjudicating a claim involving the use of false testimony, the 'any reasonable likelihood' standard has been applied to determine materiality."), cert. dismissed, 531 U.S. 1134 (2001); *Fairman* v. *Anderson*, 188 F.3d 635, 646 (5th Cir. 1999) (same); *Creel* v. *Johnson*, 162 F.3d 385, 391 (5th Cir. 1998), cert. denied, 526 U.S. 1148 (1999).

conclusion does not warrant further review. Petitioner offers no credible explanation of how Gonzales' purportedly false testimony that he believed he had seen Bellush in Texas nearly two months before she was killed would affect the jury's decision on whether petitioner was guilty of procuring her murder. The significance of Gonzales' testimony was that Gonzales and Del Toro were searching for Bellush to assault her; whether they actually saw her or mistook someone else for her was immaterial. Moreover, the government itself provided petitioner Bellush's flight schedule, which indicated she did not return to Texas until September 14, 1997. On cross-examination, defense counsel introduced that flight schedule into evidence, and when confronted with it, Gonzales admitted that prosecutors had previously told him that Bellush was not in Texas on the day Gonzales believed he saw her in Boerne. 6/20/00 Tr. 277-278. Thus, the government did not allow false testimony to go uncorrected before the jury. Accordingly, the testimony did not result in any "corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104. As the court of appeals explained, "[w]here falsehoods are 'sufficiently exposed before the jury to enable the jury to weigh those falsehoods in its deliberations,' such falsehoods are not material, because 'enough information was provided to the jury to enable [it] to adequately perform [its] fact-finding function and to maintain the level playing field between the prosecution and the defense.'" Pet. App. 31 (quoting *O'Keefe*, 128 F.3d at 896-897).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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